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REPORT ON RECENT ETS
AND IAQ DEVELOPMENTS

March 5, 1993

SHB

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REPORT ON RECENT ETS AND IAQ DEVELOPMENTS

IN THE UNITED STATES

REGULATORY AND LEGISLATIVE MATTERS

CONGRESS

◆[1] Bill to Ban Smoking in Federal Buildings Introduced

On February 16, 1993, Representative Jim Traficant (D-Ohio) introduced the "Ban on Smoking in Federal Buildings Act." (H.R. 881.) The measure, which was referred to the House Committee on Public Works and Transportation, would prohibit smoking in any indoor portion of a Federal building and in any other space owned or leased for use by a federal agency. Executive, judicial and legislative branch buildings would be covered by the Act. When he introduced the bill, Traficant cited the EPA Risk Assessment on ETS in support of the measure.

On February 23, 1993, Traficant chaired a hearing before the House Subcommittee on Public Buildings and Grounds. Witnesses who testified were Gerald Thacker of the General Services Administration and Dr. John W. Hoyt, Chairman of the Department of Critical Care Medicine at the St. Francis Medical Center in Pittsburgh, Pennsylvania. Smoking policies in the House and Senate were addressed, as were the alleged health effects of ETS exposure. Hoyt discussed the EPA risk assessment in his testimony. Additional hearings on the bill are currently scheduled for March 11, 1993.

Meanwhile, according to press reports, the General Services Administration, which manages most of the federal government's real estate, now permits smoking only in designated areas. Apparently, individual House and Senate offices set their own smoking policies, but smoking is permitted in all Capitol hallways and corridors.

House members who support a smoking ban have reportedly circulated a questionnaire to their colleagues suggesting that they adopt either a smoking ban or restrictions. House members have been asked to discuss

the issue with their staffs and report their responses to Representative Richard Durbin (D-Ill.), author of the PRO-KIDS Act of 1993, which was introduced on February 2, 1993. (H.R. 710.) See issue 40 of this Report, February 15, 1993.

The questionnaire reportedly states: "We believe it's time for Congress to set an example. We should not expect to receive any special treatment or be allowed to ignore the clear health warnings which have been given to us, most recently by the EPA." See *RollCall*, February 18, 1993; *States News Services*, February 16, 1993.

U.S. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA)

◆[2] ETS/IAQ Options Paper Nearly Complete

According to the director of OSHA's health standards program, the agency has nearly completed an options paper concerning IAQ and ETS. The paper discusses possible regulatory actions OSHA could take to address the issues either together or separately. Departing Labor Secretary Lynn Martin had charged the agency with preparing such a paper immediately following the release of the EPA Risk Assessment on ETS. See issue 39 of this Report, January 22, 1993.

Director Charles Adkins said the paper should be ready when a new OSHA Administrator takes office. As of this writing, a new OSHA administrator has not been named. Adkins said the agency is confident that it can adapt the risk assessments on ETS based upon residential exposures to determine the risks workers face on the job. Such a determination is necessary before OSHA can regulate workplace smoking. Adkins also expressed his personal opinion that consideration of IAQ and ETS issues together will not result in any rulemaking delay. See *BNB Daily Report for Executives*, February 17, 1993.

Adkins further remarked that the agency has not yet responded to the petition filed on February 5, 1993, by Public Citizen, requesting the issuance of an emergency temporary standard on ETS. See issue 41 of this Report, February 19, 1993.

- [3] *ASH v. Department of Labor*, No. 92-1661 (U.S. Court of Appeals, D.C. Circuit) (filed December 22, 1992)

On February 5, 1993, a three judge panel of the D.C. Circuit Court of Appeals entered a per curiam order denying ASH's request that its petition be considered by the same panel that had adjudicated ASH's previous petitions against OSHA. In this case, ASH is seeking an order overturning OSHA's denial of its request to commence a separate rulemaking on ETS.

- [4] **OSHA's Request for Information (RFI) on Indoor Air**

The status of the OSHA docket has changed for the first time since October 1992. Ten additional comments have been added to the public docket, bringing the total number to 1,224 submissions. The new submissions include a second comment by James L. Repace and Alfred H. Lowrey, and an additional comment by the AFL-CIO. Although the comment period has expired, OSHA has stated it will continue to accept comments but will mark them "late." A copy of the latest docket is attached as Appendix B.

On January 13, 1993, then-Labor Secretary Lynn Martin directed OSHA to provide rulemaking alternatives and an analysis of data pertinent to possible regulation relating to ETS. Martin also indicated that the review of workplace smoking issues would include information received in response to the RFI, but that ETS issues would be separate from any indoor air quality rulemaking. See issue 39 of this Report, January 22, 1993.

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA)

- [5] **EPA Requests Comment on Integrated Risk Information System (IRIS)**

On February 25, 1993, EPA published a notice in the *Federal Register* announcing that ETS is among the substances scheduled for review by EPA work groups in connection with an internal review of EPA's scientific database, the Integrated Risk Information System (IRIS). See 58 Fed. Reg. 11490 (February 25, 1993). A copy of the notice is attached as Appendix C.

STATE AND LOCAL GOVERNMENTS

- [6] **Privacy Legislation**

The term "privacy legislation" refers to state statutes which protect workers who smoke off the job or, more generally, use legal products or engage in legal activities outside the workplace.

• Alaska

A House bill introduced on January 15, 1993, would prohibit employers from discriminating against individuals who use legal products in a legal manner outside the workplace. The bill was reported from the House Committee on Labor and Commerce and sent to the House Judiciary Committee on February 17, 1993. A Senate version of the bill was reported from committee without recommendation. See H.B. 62, 18th Legislature - 1st Reg. Sess. (1993).

• Florida

On February 17, 1993, a bill was introduced and sent to the Senate Committees on Commerce and Judiciary that would prohibit employment discrimination based on participation in lawful activities away from the workplace during nonworking hours. The bill would provide sanctions. See S.B. 1610, 13th Legislature - 1st Reg. Sess. (1993).

• Hawaii

A House bill relating to "fair employment practices" was introduced on January 28, 1993; it provides that employers cannot prohibit legal activities as a condition of employment. See H.B. 1711, 17th Legislative Session - 1st Reg. Sess. (1993). Another bill with similar provisions was introduced on January 29, 1993. Both bills were sent to House Committees on Labor and Public Employment and Judiciary on January 29, 1993. See H.B. 2147, 17th Legislative Session - 1st Reg. Sess. (1993).

• Idaho

A bill introduced on February 15, 1993, would make it unlawful for any employer to discriminate against an applicant or employee who engages in the use of lawful consumable products off the workplace during nonworking hours. See H.B. 1169, 52d Legislature - 1st Reg. Sess. (1993). The bill was sent to the Senate Committee on Judiciary and Rules.

• Iowa

On January 21, 1993, a bill was introduced and sent to the House Committee on State Government that

would prohibit termination of an employee for engaging in a lawful activity outside of work hours and off the premises of employment, except under certain circumstances. *See* H.F. 39, 72nd General Assembly - 1st Reg. Sess. (1993). A bill with similar provisions was introduced and sent to the House Committee on Labor and Industrial Relations on February 18, 1993. *See* H.F. 233, 72nd General Assembly - 1st Reg. Sess. (1993). A companion Senate bill was introduced on February 16, 1993. *See* S.F. 127, 72nd General Assembly - 1st Reg. Sess. (1993).

• **Kansas**

A bill that would protect certain lawful activities of employees was introduced on February 5, 1993. The measure has been sent to the House Committee on Labor and Industry. *See* H.B. 2392, 75th Legislature - 1st Reg. Sess. (1993).

• **North Dakota**

On February 9, 1993, the Senate passed a bill that would prohibit employment discrimination based on participation in a lawful activity off an employer's premises during nonworking hours. The bill has been sent to the House Committee on Industry, Business and Labor. *See* S.B. 2367, 53d Legislative Assembly - 1st. Reg. Sess. (1993).

• **Virginia**

On February 23, 1993, the legislature passed a bill prohibiting employers from discriminating against any person who uses tobacco products outside of employment. The bill also prohibits employers from requiring, as a condition of employment, employees to use tobacco products on the job. *See* S.B. 859, Regular Session (1992-93) and *The Washington Post*, February 24, 1993.

• **Washington**

The legislature is considering privacy legislation that varies from a bill vetoed last year by then-Governor Booth Gardner. Last year's proposal focused on protecting workers for "lawful consumption of legal products," but this year's proposal refers to "lawful conduct" and would allow workers to sue employers for violation of the bill's requirements. A bill opponent, Carolyn Logue of the National Federation of Independent Business, was reported to say that passage of the bill could lead to the end of smoke-free areas in the workplace and make employers skittish about promoting healthy lifestyles and exercise. *See The Seattle Times*, February 19, 1993.

[7] **ETS-Related State and Local Legislative Activities**

◆ **Alabama**

According to a news report, the State Board of Health has asked school officials to prohibit tobacco in all public education areas, including teachers' lounges and sports arenas. Health officials reportedly cited the EPA Risk Assessment on ETS in support of the request. *See U.S.A. Today*, February 18, 1993.

◆ **California**

Governor Pete Wilson (R) signed an executive order on February 22, 1993, prohibiting smoking in 19,518 state-owned buildings and in another 2,067 state-leased buildings, including prisons and hospitals. The ban goes into effect no later than December 31, 1993. In signing the order, Governor Wilson reportedly cited the EPA Risk Assessment on ETS. The new order will reportedly affect 180,000 state workers, 110,000 prison inmates, 13,500 guards, and 4,500 hospital patients. The order apparently does not apply to the state capitol building or to the state's two university systems. States with prohibitions similar to Governor Wilson's executive order include Colorado, Delaware, Idaho, Maryland, Massachusetts, Michigan and Vermont. *See The Washington Post*, February 23, 1993, and *Los Angeles Times*, February 23, 1993.

In the California legislature, a bill that would prohibit employers from permitting smoking in enclosed places in the workplace was reported from the Assembly Committee on Labor and Employment with author's amendments, read a second time, amended, and re-referred to Committee. *See* A.B. 13, Regular Session (1993-94).

A bill was introduced on February 22, 1993, that would prohibit smoking on the premises of a child day care center. *See* A.B. 615, Regular Session (1993-94).

• **Local Governments in California**

An informal coalition of restaurant and bar owners presented Shasta County Clerk Ann Reed with 12,228 signatures opposing a no-smoking ordinance, according to a news report. Voters had approved an advisory measure banning smoking in virtually all enclosed public places last November, it was reported, and the Board of Supervisors adopted it unanimously in January. Apparently, enough valid signatures were identified to force the Board to nullify the ordinance or schedule a second election. The supervisors reportedly have scheduled an election for June 8, 1993. *See Sacramento Bee*, February 4 and February 24, 1993.

According to a news report, the Sausalito City Council tentatively passed, by a 3 to 2 vote, a no-smoking law that would prohibit smoking in bars, cocktail lounges, restaurants, and all workplaces. A final vote was scheduled for the Council's March 2 meeting. *See The San Francisco Chronicle*, February 18, 1993 and February 19, 1993.

On February 16, 1993, the Rancho Palos Verdes City Council voted to draft an ordinance that would ban smoking in all 35 of the city's restaurants. The measure would allow smoking in designated areas and restaurant lounges and bars. The draft ordinance will be put to a final vote in March. The Council also voted to put into code a long-standing policy that bans smoking in city buildings. *See Los Angeles Times*, February 18, 1993.

The Davis County Council voted 5-0 on February 17 to ban smoking in indoor and outdoor public places, according to a news report. The Council reportedly cited alleged health dangers linked to ETS exposure. The new ordinance prohibits smoking in indoor places such as restaurants, bars, and tobacco shops. There will be no smoking at outdoor public events, sports fields, and spots near doors to smoke-free buildings. Workplaces are also required to be smoke-free. *See Sacramento Bee*, February 25, 1993.

◆ According to a news article, the Fillmore City Council will not ban smoking in restaurants and other public establishments; it voted unanimously on February 23 to draft a less-stringent ordinance that would allegedly ban smoking only in city-owned facilities. City officials won't vote on a final draft of the ordinance until approximately March 9. A community educator in favor of the stricter ordinance reportedly cited the EPA Risk Assessment. "There is no safe level of exposure," she was quoted as saying. *See Los Angeles Times*, February 25, 1993.

• Connecticut

A bill introduced on January 11, 1993, would prohibit smoking in buildings open to the general public. A woman testifying in favor of the legislation was reported to have suffered a seizure that she blamed on ETS in the Legislative Office Building. The woman, Linda Dusek Ravenell, claims she is highly sensitive to allergens, "particularly ETS." *See H.B. 5403*, Reg. Sess. (1993) and *The Hartford Courant*, February 17, 1993.

• Idaho

A bill introduced on February 9 and sent to the House

Committee on Local Government would permit cities and counties to regulate, restrict or prohibit smoking at public meetings and in public places. *See H.B. 176*, 52d Legislature - 1st Reg. Sess. (1993).

• Local Governments in Illinois

The Chicago City Council reportedly is planning to repeal the city's ordinance on smoking in public places in favor of the state's stronger mandate, which prohibits smoking in all public buildings except in designated smoking areas. *See Chicago Tribune*, February 17, 1993.

According to a news report, a group of parents in Eldorado protested a new school district policy that forbids smoking or drinking by athletes during the summer and holidays. It was reported that the parents thought the policy was inappropriate because it controls students' behavior during off hours. *See U.S.A. Today*, February 9, 1993.

◆ Kansas

A bill to ban smoking in the statehouse after July 1, 1993, and to prohibit smoking in home day care centers in the presence of children received tentative House approval February 23, 1993, according to one news report. If the measure passes, it will go to the Senate. Supporters of the proposal reportedly noted the EPA Risk Assessment on ETS. *See The Kansas City Star*, February 24, 1993.

◆ Local Governments in Maryland

A bill proposed by Howard County Councilman C. Vernon Gray would prohibit smoking in county workplaces, shopping malls, restaurants that seat fewer than 75 people, and houses used as a day care center. Gray reportedly said his proposal was prompted by the release of the EPA Risk Assessment on ETS. A supporter of the provision was quoted as saying, "I am very sympathetic to having no-smoking laws. The risk of cancer is too serious." *See The Baltimore Sun*, February 11, 1993.

◆ The risk assessment also was cited in support of another measure introduced to restrict smoking in public places. The sponsor of the measure, Maureen Lamb, was quoted as saying, "We all know that breathing secondhand smoke is as dangerous as breathing asbestos," she was quoted to say. She reportedly based her assertion on the EPA Risk Assessment on ETS. *See Baltimore Morning Sun*, February 11, 1993.

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• Minnesota

The Senate Family Services Committee has approved a bill that would prohibit smoking in the houses of family day care providers while children are present. The measure would apply to more than 100,000 children in licensed family day care homes, approximately 60 percent of which are said to be smoke free currently. *See* S.F. 32, 78th Legislative Session - Reg. Sess. (1993) and *Star Tribune*, February 17, 1993. A companion bill has been introduced and sent to the House Committee on Health and Human Services. *See* H.F. 252, 78th Legislative Session - Reg. Sess. (1993).

Several bills were introduced recently and sent to committees that would include apartment and condominium common areas in the definition of public places where smoking is prohibited and would require employers to adopt written smoking policies. One bill requires posting of policies and prohibits retaliation for complaints. *See* H.F. 387, S.F. 372, H.F. 423, 78th Legislative Session — Reg. Sess. (1993).

◆ Ohio

According to a news report, the Cuyahoga County Commissioners are considering a ban on smoking in most county-owned buildings. Commissioners were reportedly leaning toward enacting the ban for several reasons, including the EPA Risk Assessment on ETS. Commissioner Timothy Hagan was reported to say that he feared that, by failing to adopt a smoking ban, the county would open itself to liability suits. *See The Plain Dealer*, February 24, 1993.

• Rhode Island

A bill introduced February 9, 1993, and sent to the Senate Judiciary Committee would allow the family court to consider the smoking habits of a parent when awarding custody. It would allow the court to order a parent to quit smoking as a condition of custody. *See* S.B. 318, Reg. Sess. (1993).

Three bills were recently introduced and sent to the Senate Committee on Health, Education and Welfare. The first would prohibit smoking in restaurants; the second would prohibit smoking in nursing homes except in a designated smoking room; and the third would prohibit smoking in the State House and provide penalties for smoking in public places. *See* S.B. 423 & S.B. 297 & S.B. 204 -Reg. Sess. (1993).

• Tennessee

Senate and House bills were introduced on February 17, 1993, and sent to committee that would prohibit smoking

in public places unless a separately ventilated smoking area is provided. *See* S.B. 1328 and H.B. 1278, 98th General Assembly — 1st Reg. Sess. (1993).

• Texas

According to a news report, a bill was introduced February 24, 1993, that would prohibit smoking in common work areas, rest rooms and other public places. *See United Press International*, February 24, 1993.

◆ Local Governments in Texas

Relying in part on the EPA Risk Assessment on ETS, the Arlington City Council has unanimously approved a partial ban on smoking at Six Flags Over Texas, the Texas Rangers' new stadium and other outdoor facilities, according to a newspaper article. *See The Dallas Morning News*, January 27, 1993.

In another news article, the Arlington School trustees are reported to be considering expanding the school district's ban on smoking in schools to include teachers and other district employees. The current ban applies only to students. Board President John McInnis was reported to cite the recent EPA Risk Assessment on ETS as the reason the District should prohibit tobacco use anywhere on school grounds. *See The Dallas Morning News*, February 25, 1993.

• Utah

A bill that would require businesses with smoking areas to provide information regarding the alleged health effects of ETS to employees exposed to ETS was amended on the House floor and passed on February 22, 1993. On February 23, 1993, the Senate refused to concur in the House amendments. The House refused to recede from the House amendments. The bill is now in Conference Committee. *See* S.B. 67, 50th Legislature - General Session (1993).

◆ Virginia

A bill that would have restricted or banned smoking in virtually all public buildings and workplaces was withdrawn by its sponsor, it was reported. The bill had passed both the Senate and House in a revised form that would have covered day care centers. One of the bill's proponents was reported to have hoped for better. "This looked like it would be our best year, with the EPA report," the proponent was quoted as saying. She apparently asked the Senate to kill the bill for the year rather than send it to the Governor for his signature.

See *United Press International*, February 18, 1993, and *The Washington Post*, February 24 and 25, 1993.

• Washington

According to a news report, the legislature is considering a law that would ban smoking in automobiles which are carrying people under the age of 16. See *Channel 5 News*, WMAQ-TV (NBC), February 1, 1993.

◆ In addition, citing the EPA Risk Assessment on ETS, the State Board of Health has reportedly passed a resolution by unanimous vote calling upon state officials and legislators to pass legislation and support other efforts to discourage the use of tobacco products by youth. See *PR Newswire*, February 16, 1993.

[8] IAQ-Related State and Local Legislative Activities

• Florida

On February 9, 1993, a bill was introduced and sent to the House Committee on Governmental Operations that would require the Management Services Department to evaluate and develop procedures to improve indoor air quality in state buildings. The bill would require said agencies to operate mechanical ventilation infiltration systems in compliance with certain industry standards. See H.B. 1723, 13th Legislature - 1st Reg. Sess. (1993).

• Missouri

On January 6, 1993, a bill was introduced that would require the Department of Health to establish and enforce air quality and ventilation standards in public buildings through establishment of an indoor air program. The measure would apply to buildings owned or leased by the state; state, county and municipal buildings occupied by public employees would be operated according to ASHRAE Standard 62-1989. The measure was sent to House Committee on Public Health and Safety. See H.B. 245, 87th Legislative Assembly — 1st Reg. Sess. (1993).

• New York

A bill was introduced on February 16, 1993, and sent to the Assembly Committee on Health that would require building owners to maintain an indoor environmental plan. See A.B. 3603, 215th General Assembly - 1st Reg. Sess. (1993).

On January 21, 1993, a bill was introduced that directs the Department of Environmental Conservation to

establish standards for acceptable indoor air quality applicable to all public buildings within the state. The measure was sent from the Assembly Committee on Environmental Conservation to the Committee on Ways and Means. See, A.B. 1397, 215th General Assembly — 1st Reg. Sess. (1993).

• Utah

A bill that relates to ventilation in smoking areas and that would provide ventilation standards for smoking areas was introduced on February 9, 1993. See H.B. 434, 50th Legislature - General Session (1993).

ETS-RELATED LITIGATION AGAINST CIGARETTE MANUFACTURERS

[9] *Blanchard*: Court Holds Scheduling Conference

At a scheduling conference held on March 3, 1993, the court set a briefing and discovery schedule leading up to an April 30 hearing on defendants' motions to transfer venue to the District Court of Dallas County. The court did not set a trial date for the case or schedule a pretrial conference.

Three of the 14 plaintiffs in this case presently allege injury from exposure to ETS. Raye Blanchard and Tamara Reed, mother and daughter, both claim damages for unspecified "illness and disease" allegedly resulting from exposure to the ETS from cigarettes smoked by Raye's deceased husband, Thomas, and by Raye herself, who claims she smoked "for about ten years." The third ETS plaintiff, Pamela Kastrin Stephens, claims unspecified "lung and respiratory diseases" allegedly caused by exposure to the ETS from the cigarettes smoked by her deceased father. The named defendants are purported to be the six major U.S. cigarette manufacturers, The Tobacco Institute, the Council for Tobacco Research, and a number of wholesalers and retailers. *Blanchard, et al. v. R.J. Reynolds Tobacco Company, et al.* (District Court, Galveston County, Texas) (filed July 31, 1992).

[10] *Broin*: Trial Court Hears Lorillard's Motion for Sanctions

On March 3, 1993, the trial court heard argument on Lorillard's motion for sanctions. The judge gave plaintiffs two additional weeks to fully respond to the

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outstanding interrogatories and requests for production. He reserved ruling on the sanctions.

In the Third District Court of Appeal, plaintiffs filed their response to defendants' petition for certiorari on February 19, 1993. The certiorari petition seeks review of the trial court's denial of a protective order concerning notices to depose senior executives of six defendants. Defendants' reply is due on March 16.

Also in the Third District Court of Appeal, defendants have asked for a 20-day extension for filing their responsive brief in the appeal of the trial court's order dismissing the class action allegations of plaintiffs' complaint. If the request is granted, the brief will be due on March 29. Plaintiffs filed their opening brief on January 19, 1993.

At issue in this case are the claims of 30 flight attendants allegedly injured by occupational exposure to ETS. The injuries alleged by the putative class representatives include lung cancer, breast cancer and unspecified respiratory ailments. The defendants are purported to be the six major U.S. cigarette manufacturers (plus related entities), UST, Inc., United States Tobacco Co., Dosal Tobacco Corp., the Council for Tobacco Research, The Tobacco Institute, and three other trade associations. *Broin, et al. v. Philip Morris, et al.* (Circuit Court, Dade County, Florida) (filed October 31, 1991).

◆[11] *Butler*. Plaintiffs Take 30(b)(6) Depositions

Plaintiffs conducted Rule 30(b)(6) depositions of the four tobacco wholesaler defendants on February 25 and 26, 1993. The areas of inquiry in the depositions included the alleged health effects of ETS and the EPA Risk Assessment on ETS.

Plaintiffs have requested additional time to file a supplemental brief on their motion to remand based on testimony from the depositions.

In this case, Burl Butler alleges that he has lung cancer and other injuries caused by exposure to ETS in the barber shop he has owned and operated for approximately 30 years. His wife, Dean, claims loss of consortium and emotional distress. The defendants are the six major U.S. cigarette manufacturers and four tobacco wholesalers. *Butler v. R.J. Reynolds Tobacco Co., et al.* (U.S. District Court, Southern District, Mississippi) (filed October 21, 1992).

ETS/LAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

◆[12] *Department of Housing and Urban Development, Region V and American Federation of Government Employees Local 3701, Case No. 92 FSIP 205 (Federal Service Impasses Panel)* (decided February 11, 1993)

A Federal Service Impasses Panel has ordered that smoking no longer be permitted in private offices in the HUD office in Cleveland, Ohio. The order follows union complaints that employees in work stations adjacent to the private offices were being exposed to ETS due to the inadequacy of the ventilation system to completely clear the air. Citing the EPA Risk Assessment on ETS as part of "the overwhelming body of scientific evidence that has conclusively established the health hazards associated with the passive inhalation of second-hand or environmental tobacco smoke," the Panel also, sua sponte, banned smoking from designated sections in lunch and break rooms. According to the Panel, employees who smoke will only be permitted to do so in reasonably accessible outdoor areas that provide a measure of protection from the elements.

LEGAL ISSUES AND DEVELOPMENTS

[13] *Underwriting Newsletter Minimizes Potential Impact of the EPA Risk Assessment on Damage Awards in ETS Cases*

"Pronouncements of the plaintiff's bar notwithstanding, there is little reason to anticipate any significant impact on damages underwriters can expect to pay nonsmoking victims of lung cancer or other respiratory ailments as a result of EPA's classification as a 'Group A' carcinogen," Best's *Underwriting Newsletter* states in its February 1993 issue. "Plaintiffs must still bear the burden of proving the causal relationship between exposure to secondhand smoke and their own injuries, a process which is significantly more difficult than simply attributing the deaths of 3,000 nonsmokers each year to passive smoking."

The article criticizes numerous aspects of the science in the risk assessment. According to the article, "The strongest criticism of EPA's findings lies in their

acceptance of statistical significance at a 90% confidence interval. This constitutes a significant departure from all past EPA hazard assessments as well as generally accepted research standards, which demand at least 95% confidence to support conclusions as strong as those EPA has drawn." The article concludes that the "scientific evidence supporting the risk assessment is the least persuasive EPA has ever accepted."

The article further asserts that "[b]usinesses that permit smoking on the premises may arguably face an exposure to claims by customers or employees, but the prevalence of ETS, the relatively low level of exposure and the lack of any scientific evidence linking it to adverse health effects should serve to insulate them."

The article claims that tobacco companies, rather than employers and businesses, "remain the most promising defendants" for ETS litigation. The article also claims that the risk assessment is likely to promote new state laws restricting smoking in public places and OSHA standard on smoking in the workplace. See "Will Passive Smoking Claims Burn Your Bottom Line?" Best's *Underwriting Newsletter*, February 1993. The publisher of the newsletter, A.M. Best Company, Inc., provides a wide range of underwriting information to U.S. insurance companies.

[14] Tort Reform Measure May Impact ETS Litigation in Texas

The state legislature has reportedly sent a measure to Governor Ann Richards (D) that would prohibit suits against the manufacturers of products that are claimed to be widely known to be dangerous even when used as designed, such as tobacco, alcohol and other items of personal consumption such as butter and sugar. Critics of the measure say they believe it will stifle ETS lawsuits, although such suits are not specifically addressed in the measure. See *The Dallas Morning News*, February 20, 1993.

◆[15] "Secondhand Smoke Suits May Catch Fire," A. Blum, *The National Law Journal*, March 1, 1993

With references to the EPA Risk Assessment on ETS and the Americans with Disabilities Act (ADA), this article discusses the predictions that are being made about an increase in ETS litigation. Members of the

plaintiffs' bar reportedly claim that the risk assessment "has created such a high degree of public awareness," that it will be easy to meet the burden of proof on causation in ETS cases. Other attorneys disagreed with this analysis, however, stating that science does not support the risk assessment.

The *Broin* and *Butler* cases are highlighted in this article, and brief mention is made of *Helling v. McKinney*, the prisoner ETS case currently pending before the U.S. Supreme Court.

According to Richard Daynard, who was consulted for this article, there have been a "good number" of ETS cases and more are on the way. He argues that the ADA will be a powerful tool in banning smoking in public places to make them accessible to individuals with asthma. An official with the Equal Employment Opportunity Commission, which is enforcing the ADA, disagreed, stating "The ADA does not require employers to have a smoke-free environment or prevent it." Even if a person could prove that asthma or an allergy were disabling, the official added, it is unclear whether the ADA would require a smoke-free environment. "That could also be an undue hardship on the company and other employees," the official is quoted as saying.

The article also speculates that the risk assessment may prompt new OSHA regulations and discusses the action taken by departing Labor Secretary Lynn Martin in response to the risk assessment.

[16] Supreme Court Success Could Bring New Lawsuit

Nevada prisoner William McKinney, whose case against state prison officials is currently pending before the U.S. Supreme Court, has reportedly said that he will sue on behalf of smokers if his case results in a ban on cigarettes in prison. *Helling v. McKinney* (U.S. Supreme Court) (argued January 13, 1993). McKinney, a nonsmoker, claims that exposure to ETS in prison is cruel and unusual punishment under the Eighth Amendment, and he wants Nevada to provide separate nonsmoking areas in prisons. He is, however, apparently sensitive to the problems allegedly experienced by inmates who try to quit smoking, and does not want them to suffer in a totally smoke-free prison environment. See *Associated Press*, February 27, 1993.

SCIENTIFIC/TECHNICAL ITEMS

UPCOMING MEETING

- [17] The American Institute of Architects Video Teleconference, March 4, 1993

According to a news report, this teleconference will focus on building design solutions to indoor air pollution and sick building syndrome. The teleconference is scheduled to be broadcast via satellite to about 150 cities within the United States and will be hosted by Denis Hayes, president of the Bullitt Foundation. The agenda includes panel discussions and Q&A sessions regarding multiple chemical sensitivity, future office designs and building diagnostics. See *Indoor Pollution News*, February 19, 1993.

INDOOR AIR QUALITY

- [18] "Sick Building Syndrome: Medical Evaluation of Two Work Forces," D.A. Middaugh, S.M. Pinney, and D.H. Linz, *Journal of Occupational Medicine* 34(12): 1197-1203, 1992 [See Appendix A]

The authors of this study report on their evaluations of two work forces complaining of sick building syndrome. They suggest that medical examinations indicated only minor abnormalities, but claim that neurologic and cognitive function were "strikingly abnormal." They suggest that the latter measurements may be correlated with such symptoms as headache, dizziness, and weakness.

- [19] "Assessment of Exposure to Radon Decay Products in Realistic Living Conditions," P.T. Wasiolek, P.K. Hopke, and A.C. James, *Journal of Exposure Analysis and Environmental Epidemiology* 2(3): 309-322, 1992 [See Appendix A]

This paper reports on radon measurements made using a new instrument, which were then used to assess a dosimetric model. The new measurements reportedly result in a two-fold higher dose estimate. Dose estimates were also reportedly lower if a smoker was present, presumably because more radon progeny could attach to smoke particles.

OTHER DEVELOPMENTS

- ◆[20] McDonald's Corporation Begins Testing Smoking Bans in Restaurants

Extensive media coverage has accompanied the announcement by McDonald's Corporation executives that a smoking ban is being seriously considered in its nearly 9,000 restaurants nationwide.

A test ban reportedly went into effect in 40-50 restaurants on February 22, 1993. According to a company spokesperson, the decision was not directly related to the EPA Risk Assessment on ETS, although "with the new information that's come out over the past year on passive smoking, we felt it was a good time to look into this," she was quoted as saying. See *Chicago Tribune*, February 20, 1993. The cautious approach to the issue by the giant fast-food chain is apparently designed to permit the assessment of customer and employee reaction.

Antismoking activists such as John Banzhaf, executive director of ASH, reportedly say that their campaign to urge fast-food restaurants to adopt smoking bans has been strengthened by the EPA risk assessment and believe that McDonald's, as the trendsetter in the business, could convince other chains to follow its lead. See *The Washington Post*, February 19, 1993; *The New York Times*, February 20, 1993; *Miami Herald*, February 19, 1993; *The Reuter European Business Report*, February 19, 1993; *Agence France Presse*, February 19, 1993; *The Reuter Asia-Pacific Business Report*, February 19, 1993; *NBC Nightly News*, February 19, 1993; and *CBS Evening News*, February 19, 1993.

- ◆[21] Smoking Law Exemption Requests Overwhelm Joint City-County Commission

Restaurant, bowling alley and bingo parlor proprietors have reportedly sought hardship exemptions from tough new antismoking ordinances that are intended to establish smoke-free workplaces by the end of the year in Sacramento County, California. The Sacramento Environmental Commission, a joint city-county enforcing body, has no criteria to follow in granting the exemptions, and is reportedly spending a considerable amount of time ruling on the requests.

The American Lung Association has apparently warned the commission that the EPA Risk Assessment

on ETS will probably lead to stricter laws that will ultimately prohibit the exemptions granted under the ordinance. *See Sacramento Bee*, February 11, 1993.

◆[22] **Antismoking Activists Agree to Pursue Extension of Smoking Bans**

A coalition of health groups reportedly sponsored a meeting in Washington, D.C., in January 1993, to discuss antismoking initiative priorities for the year. Participants at the meeting, apparently elated with the release of the EPA Risk Assessment on ETS, agreed that they would work toward extending existing ordinances that require smoking bans in public places. *See Journal of the American Medical Association*, February 10, 1993.

◆[23] **Nationwide Smoking Cessation Program Initiated**

Citing the EPA Risk Assessment on ETS, U.S. Surgeon General-designate M. Joycelyn Elders, M.D., reportedly announced on February 23, 1993, that Lederle Laboratories, in conjunction with state and local health agencies, will provide smoking cessation aids free of charge to smokers nationwide. Lederle, which manufactures nicotine transdermal patches, will provide two million of the patches and accompanying support services through various health programs. The patches will be enough for 50,000 participants. Some states are reportedly considering providing the patches to prisoners in facilities that have been declared smoke free. Other states apparently plan to provide the patches through maternal and child health programs. *See Reuter Transcript Report*, February 23, 1993.

◆[24] **Naval Aircraft Carrier to go Smoke Free**

Navy officials, spurred by the EPA Risk Assessment on ETS, have reportedly accelerated their plans to ban shipboard smoking on the USS Theodore Roosevelt by restricting smoking to seven restrooms. A total ban will go into effect on July 4, 1993, some three years earlier than originally planned. According to press reports, the aircraft carrier's policy will make it the first Atlantic Fleet carrier to adopt a smoke-free policy. *See United Press International*, February 18, 1993.

[25] **New Jersey Companies Surveyed About Smoking Policies**

A New Jersey law that requires businesses with more than 50 employees to institute smoking policies has

evidently motivated smaller companies to adopt their own restrictive policies. According to a survey of New Jersey employers, 31 percent of mid-sized employers and 11 percent of smaller employers have adopted smoking policies under the mistaken belief that they are required to do so by state law. Some 69 percent of the sites surveyed reported that they had adopted smoking restrictions at the direction of the business owner rather than in response to other concerns such as local fire, health or safety ordinances. *See BNA Occupational Safety & Health Reporter*, February 17, 1993.

◆[26] **Pittsburgh Corporation Bases Smoking Ban on EPA Risk Assessment**

Miles, Inc., a Fortune 100 research-based company, has reportedly announced that it will prohibit smoking at its headquarters in Pittsburgh, Pennsylvania, beginning on March 1, 1993. Until the EPA released its Risk Assessment on ETS, the company had announced to its employees that it was going to permit smoking in designated areas in its buildings. Now, smoking will only be permitted in designated outside locations. The policy will affect visitors and contractors as well as the company's 1700 employees. *See PR Newswire*, February 25, 1993.

◆[27] **Michigan Antismoking Group Announces Legislative Agenda**

The Michigan Coalition on Smoking OR Health has reportedly announced that, based on the EPA Risk Assessment on ETS, it will lobby the legislature during its 1993-1994 session to adopt a statewide tobacco-free schools policy, increase nonsmoking areas in restaurants, and expand the Clean Indoor Air Act into private workplaces. The Clean Indoor Air Act currently limits smoking to designated areas in publicly owned workplaces and in many public places. *See PR Newswire*, February 24, 1993.

[28] **Candidate for Senate Seat Expresses Smoking Views**

Former Texas Attorney General Jim Mattox (D), who is a candidate in the special election being held to fill the seat vacated by Senator Lloyd Bentsen (D-Tex.), is reportedly campaigning on a promise to make America "smokeless within 10 years" by advocating laws to ban smoking in public and other areas. *See The Dallas Morning News*, February 7, 1993.

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MEDIA COVERAGE

- ◆[29] "To the Editor," J. Carter, *The New York Times*, February 21, 1993

Citing the EPA Risk Assessment on ETS, former President Jimmy Carter suggests that an increase in the federal cigarette excise tax of \$2.00 a pack would contribute to reduction of the federal budget deficit and would effectively reduce tobacco use.

Carter states, "Every year nearly half a million Americans die from direct and passive smoking. . . . This proposal would raise more than \$30 billion a year in new revenue, which could be put to good use paying for health care reform, childhood immunization efforts and other high priorities. In this way, tobacco could begin to pay its fair share of the tremendous costs it imposes on our society."

- ◆[30] "A law to protect kids from smoke," R.J. Durbin, *Chicago Tribune*, February 18, 1993

In this opinion piece, Representative Richard J. Durbin (D-Ill.) discusses the EPA Risk Assessment on ETS and the legislation he has introduced to prohibit smoking in facilities providing federally funded programs and services. (H.R. 710.) See issue 41 of this Report, February 19, 1993.

Stating "you don't have to smoke to suffer the harmful effects of tobacco," Durbin says he finds it "ironic" that some of the federal programs that promote the health and well-being of children, such as Head Start, WIC (Women, Infants and Children), and health care and day care programs, "do not ensure that children, while participating in them, are protected from the harm of secondhand tobacco smoke."

- ◆[31] "Where There's Smoke, There's Somebody Fired Up Against It," R. Schatz, *New York Newsday*, February 21, 1993

This article discusses the EPA Risk Assessment on ETS and the efforts that are being made around the country to limit workplace exposure to ETS. According to David Vladock, acting director of Public Citizen Litigation Group, OSHA will likely make ETS a top priority when a new director is named. The author attributes to Public Citizen a successful campaign against OSHA to force the regulation of other carcinogens.

- ◆[32] "Stop Smoking, Quit for Your Kids," B. Arnot, M.D. *CBS This Morning*, February 15-19, 1993

This series, broadcast on network television, explored ETS and smoking and health issues. The first program in the series opened with a reference to the EPA Risk Assessment on ETS and focused upon a smoking cessation program purportedly being conducted to benefit children in Mount Carmel, Illinois, whose parents smoke. See issue 38 of this Report, January 7, 1993.

The third program in the series highlighted a smokers' helpline telephone counseling service that is available to smokers in California. According to one of the helpline counselors, many of the callers are concerned about the alleged health effects of ETS on their children or other family members. Apparently, this series is available on videotape and each program closes with a telephone number for viewers to order a copy of the videotape.

- ◆[33] "Secondhand Smoke Brings Surge of Smoking Restrictions," P. Raeburn, *AP*, February 28, 1993

This article discusses reaction to the EPA Risk Assessment on ETS by restaurant owners, businesses and governments around the nation. According to the writer, many business proprietors, concerned about liability, view the report as a "blessing" to justify imposing smoking bans. Enforcement concerns are evidently not a problem in some areas, where nonsmokers are enforcing smoking bans themselves either by challenging smokers who light up in restricted areas or by reporting such activity to security guards.

IN EUROPE & AROUND THE WORLD

REGULATORY AND LEGISLATIVE MATTERS

AUSTRALIA

- [34] State MP Announces Plan to Ban Smoking in Vehicles with Children

MP Richard Jones has reportedly instructed Parliamentary lawyers to draft changes to the Public Health

Act of 1991 to prohibit smoking in motor vehicles, including taxis, in which children under the age of 18 are present. Jones claims that he suffers an incurable bronchial disorder as a result of damage caused by exposure to his parents' smoking. *See The Sunday Telegraph*, January 31, 1993.

AUSTRIA

[35] Health Minister Pushes for Tough Smoking Restrictions

Health Minister Michael Ausserwinkler, relying upon information from the U.S. regarding the alleged dangers of ETS exposure, is reportedly pushing the government to enact a ban on smoking in public and federal buildings, in educational facilities, on mass transit and in other establishments such as hair salons. Under the plan proposed by the Health Minister, restaurants would be exempt unless they were sufficiently large to designate a nonsmoking section.

A spokesperson for the Green Party reportedly gave his support to the plan, saying that the rights of nonsmokers must be favored under the law. *See Salzburger Nachrichten*, February 4, 1993.

BRAZIL

[36] Smoking Banned on Senate Floor

The Senate has reportedly banned smoking on the floor of the federal Senate. The move was evidently taken to set "an example for the country and for different public and private institutions." *See Correio Braziliense*, December 22, 1992.

CANADA

[37] Ontario Government Outlines Position on Smoking

On January 18, 1993, Health Minister Frances Lankin released the government's discussion paper relating to tobacco control legislation that will be proposed during the 1993 Spring legislative session. Among other matters, the discussion paper addresses ETS and proposes eliminating smoking in schools, workplaces and public places by 1995.

To that end, the government plans to prohibit smoking where children are present, in health care facilities, and in locations where "people must go to carry out routine daily activities, such as banks, retail stores, transit shelters. . . ." Further bans and restrictions in additional public places will also be considered. The government invites written submissions in response to its paper by March 15. They can be addressed to: Tobacco Legislation Consultation, Health Promotion Branch, 6th Floor, 36 Toronto Street, Toronto, Ontario, M5C2C5.

PHILIPPINES

[38] Health Secretary Bans Smoking in Department of Health Buildings

Health Secretary Juan Flavio has reportedly declared the Department of Health Compound in Manila a smoke-free zone. The zone apparently includes 36 buildings, garages, parked vehicles and roads within the central office. *See The Journal*, February 23, 1993.

SINGAPORE

[39] Parliament Passes Smoking Ban

On February 26, 1993, Parliament reportedly passed a bill which prohibits those under the age of 18 from smoking in public places. Offenders will be subject to fines ranging from \$30 for a first conviction to \$60 for subsequent offenses. Smoking is already banned in many public places in Singapore. *See The Reuter Library Report*, February 26, 1993.

ETS/IAQ LITIGATION NOT INVOLVING CIGARETTE MANUFACTURERS

GERMANY

[40] *In re Bundeswehr* (Berlin) (decided February 25, 1993)

According to press reports, a Berlin court has ruled that the German army is not required to provide a smoke-free environment. Apparently a lieutenant

colonel had sued the army, claiming that ETS exposure had harmed his health. In dismissing the suit, the court noted that the army provides smoke-free single rooms and that this fulfilled its obligation to provide relief to those who allege their health is negatively affected by ETS. See *The Reuter Library Report*, February 25, 1993.

LEGAL ISSUES AND DEVELOPMENTS

[41] Tobacco Companies Make Legal Aid Submission

Several U.K. Cigarette manufacturers recently made submissions to the Legal Aid Board. The submissions were made in response to reports that some lawyers were preparing legal aid applications on behalf of employees who claim their employers failed to protect them from the alleged effects of ETS exposure in the workplace. It has been recently reported that some of the potential claimants are former tobacco company employees.

SCIENTIFIC/TECHNICAL ITEMS

RECENT MEETING

[42] "Building Design, Technology and Occupant Well-Being in Temperate Climates," Brussels, Belgium, February 17-19, 1993

This conference, attended by approximately 300 scientists from around the world, featured presentations on IAQ, ventilation requirements, smoking policies in the context of sick building syndrome, risk assessment, and carpet emissions. According to a press release, issued by conference sponsors, the aim of the meeting was to apply skills and expertise of individuals from a wide variety of disciplines to explore ways in which building design, construction and operation affects the quality of indoor environments in which people live and work. The program covered topics emphasizing human well-being in those environments.

Conference proceedings are expected to be available in late May or early June 1993. Its sponsors included ASHRAE and the Federation of European Heating and Air Conditioning Associations.

LUNG CANCER

- [43] "Lung Cancer Through Passive Smoking at the Workplace — A More Theoretical Issue," F.X. Adlkofer, *Zentralblatt für Arbeitsmedizin, Arbeitsschutz Prophylaxe und Ergonomie* 42(10): 400-424, 1992 [See Appendix A]

The author of this article reviews ETS composition, ETS exposure data, and the epidemiologic literature on ETS exposure and lung cancer. He concludes that lung cancer risk purportedly due to ETS exposure "can neither be entirely ruled out or proved, let alone quantified." [The article is written in German; however, an English abstract is provided. The article was first discussed here in Issue 38, January 7, 1992.]

RESPIRATORY DISEASES AND CONDITIONS — ADULTS

- [44] "Effects of Bronchoprovocation Challenge Test With Cigarette Sidestream Smoke on Sensitive and Healthy Adults," B. Danuser, A. Weber, A.L. Hartmann, and H. Krueger, *Chest* 103: 353-358, 1993 [See Appendix A]

Swiss researchers report in this paper on a "cigarette bronchoprovocation challenge test," in which sidestream smoke (as a surrogate for ETS) was administered to 20 persons via mouthpiece. Lung function parameters reportedly did not change after smoke exposure in ten healthy subjects. However, the authors report statistically significant decreases in lung function parameters for ten subjects classified as hyperreactive.

- [45] "Environmental Tobacco Smoke and Asthma," R.J. Shephard, *Chest* 103(2): 330-331, 1993 [See Appendix A]

This editorial comments on the Danuser, et al., study. The author praises their technique for smoke exposure, but calls for additional experiments to generate further data.

OTHER HEALTH ISSUES

- [46] "Paternal Smoking and Birthweight in Shanghai," J. Zhang and J.M. Ratcliffe, *American Journal of Public Health* 83(2): 207-210, 1993 [See Appendix A]

Data from a case-control study of birth defects and newborn mortality in Shanghai, China, are used to examine purported relationships between paternal smoking and birthweight. The authors report that infants whose fathers smoked weighed 30 grams less at birth, after adjustment for several factors, including maternal age and occupation.

INDOOR AIR QUALITY

- [47] "Sensory Characterization of Air Quality and Pollution Sources," P.O. Fanger, In: *Chemical, Microbiological, Health and Comfort Aspects of Indoor Air Quality — State of the Art in SBS*, H. Knoppel and P. Wolkoff (eds.), Dordrecht, The Netherlands, Kluwer Academic Publishers, 59-71, 1992 [See Appendix A]

According to the author of this paper, "hidden" pollution sources are responsible for occupant complaints about air quality. He further suggests that attention to occupant perceptions of odor and air quality may be of use in evaluating sick building syndrome.

SMOKING POLICIES AND RELATED ISSUES

- [48] "Smoking Policies for Public Service Vehicles in Oxfordshire, United Kingdom," J. Mindell and M. Bolley, *Tobacco Control* 1: 268-271, 1992 [See Appendix A]

According to the authors of this article, their survey of bus and coach companies in one English county shows that 38 percent of the companies banned smoking entirely. The authors invoke claims of increased passenger comfort, increased business, and reduced cleaning costs in their call for government legislation banning smoking on public transportation.

STATISTICS AND RISK ASSESSMENT

- [49] "Risk Assessment Methods for Exposure to Environmental Substances Found Indoors," T.D. Sterling, C.W. Collett, W.L. Rosenbaum, and J.J. Weinkam, paper presented at "Building Design, Technology and Occupant Well Being in Cold and Temperate Climates," Brussels, Belgium, February 17-19, 1993 [See Appendix A]

The authors of this paper compare two methods for evaluating risks possibly related to low exposures:

downward extrapolation from high to low exposure, and epidemiologic studies estimating relative risk. They conclude that neither method is sufficiently valid for drawing conclusions about purported risks.

OTHER DEVELOPMENTS

AUSTRALIA

- [50] Auditorium to Provide Smoke-free Concerts

According to the president of the Newcastle Workers Club, the facility which opened last year will be a "smoke-free zone" during events attracting those under the age of 18 and at the request of the performing artists. See *The Newcastle Herald*, February 2, 1993.

CHINA

- [51] Students Patrol Ferries to Confront Smoking Ban Violators

According to press reports, teenaged students patrolled selected Hong Kong Ferry Company vessels for a week to warn smokers about the smoking ban that went into effect in August 1992. Evidently, the \$5,000 fine has not motivated all passengers to stop smoking on the ferries, and the company recruited the student "ambassadors" to educate passengers before the company begins to step up prosecutions. See *South China Morning Post*, February 18, 1993.

UNITED KINGDOM

- [52] Doctor Disputes Claims of ETS Health Hazards

Dr. James LeFanu recently responded to the Veronica Bland case and Health Secretary Virginia Bottomley's threats to enforce smoking bans with fines, by challenging the accuracy of studies purporting to show that ETS exposure increases the risk of lung cancer.

The doctor cites the critical evaluation of such studies undertaken by Dr. Peter Lee and states "it is a mistake to invoke the law to stamp out a habit which, in the context of our noisy, polluted, dangerous cities, must be deemed only a minor irritant." LeFanu criticizes Bottomley for her "dogmatic and interventionist" public position. See *The Sunday Telegraph*, January 31, 1993.

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